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Automobiles: Guest and invitee; negligence, degree of care

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the wife the right to bring a tort action against the husband himself? Palpably the intent of the legislature is not clear and therefore the common law should prevail.

It is an accepted tenet, that under the common law the husband had no right of action against his spouse for being one with her, he could not sue himself. The construction of the statute by the majority in this case creates new rights for the wife and hence necessarily creates new rights for the husband since the constitution guarantees equal rights for all. Now if such radical change in the law had been the intent of the legislature, it must surely have expressed itself with indisputable clearness and definiteness. This it did not do.

Undoubtedly the legislature intended to remove discriminations against married women and give them *equal* rights with their husbands before the law and consequently the statute should not be construed as creating *new* rights, which it does under the interpretation of the majority opinion since at common law neither spouse had the right to sue the other. Neither was it the intent of the legislature to open the door to increased litigation which might presumably follow for as Justice Eschweiler states: "The uninvited kiss no matter how cold and chaste, upon the non-consenting alabaster feme sole brow, is an assault and battery and substantial damages may be awarded for such."[14]

Regarding the public policy affected by this decision, it has always been recognized that while marriage is a civil contract, so far as its validity in law is concerned, yet the moment such contract is entered into, a status of an exclusive nature arises between the parties, and many of the rules applicable to contrasts are necessarily excluded from application to the marriage contract. The peace and tranquility of the conjugal relation demand that each party to a marriage forswear, certain rights which each enjoys as a sole and hence the common law has always refused to recognize tort liabilities between the members of a family.

URBAN R. WITTIG

Automobiles: Guest and invitee; negligence, degree of care.—With the great volume of automobile cases which has of recent years kept our courts busy to capacity one might think that the law as it applies to owners and operators of motor vehicles should be quite definitely settled. To a considerable extent this is true and because of this fact comparatively few such cases are being appealed. Occasionally, however, a decision is rendered by the Wisconsin Supreme Court which materially changes the practising attorney's preconceived notions as to this branch of the law.

The liability of the owner or operator of an automobile to an invited guest in the various situations that may arise has been, and still is, somewhat in doubt. A decision of considerable importance on this phase of the law was decided by the Supreme Court on October 12, 1926.[1]

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[14] 36 Wis. 657, 17 Am. Rep. 504.

[1] *Cleary v. Eckart*, 211 N.W. (Wis.).

In this case plaintiff was a guest, riding with the defendant in her automobile. Defendant was proceeding at a reasonable rate of speed on a gravel road on which there was considerable loose gravel over a hardpan surface. Shortly after entering the gravel the defendant felt a bump in the rear of the car. She immediately applied her brakes to stop the car. The car skidded around and plaintiff was thrown out and received personal injuries. The only negligence that could be attributed to the defendant was her failure to skilfully handle the car in an emergency.

In an earlier case, *Mitchell v. Raymond,*[2] the Supreme Court had laid down the general rule as follows:

> Under this rule as now determined, the host who assumes to pilot his vehicle upon the public highways, subject as all such vehicles are to the rules and regulations governing traffic on our crowded present-day thoroughfares, becomes chargeable in such operation and management of his vehicle with the *duty of exercising ordinary care to avoid injury to his occupant.* This conclusion we are forced to reach even though the rule as thus declared may seem incongruous with the innate and natural spirit of gratitude with which such hospitality should be met. [Italics ours.]

In the *Cleary* case it was pointed out that the Supreme Court in the case of *Greenfield v. Miller,*[3] had held that a host was not liable in the absence of active negligence, to a guest in a private residence. A similar ruling was made in *O'Shea v. Lavoy,*[4] where the injury was due to a defect in an automobile which was not known to the owner.

Realizing the injustice of the broad rule of *Mitchell v. Raymond,* supra the Supreme Court in the case now under consideration has seen fit to limit that rule by saying:

> But the situation here presented indicates that such field was too loosely and too broadly defined (in the *Mitchell* case): The rule therein expressed and above quoted is now modified to read as follows:
>
> "As to gratuitous guests in a vehicle on a public highway the owner or driver of such vehicle owes to such guest the *duty of exercising ordinary care, not to increase the danger to the guest, or to create a new danger."* [Italics ours.]

It seems to the writer that the decision in the *Cleary* case will be of very great importance, particularly because of the fact that the Supreme Court has recently held that a wife may sue a husband for negligence in the operation of an automobile in which the wife is a guest. It is a matter of common knowledge that most automobile accident cases are defended by lawyers employed by insurance companies. Since the husband and wife rule has been established many cases have been brought in which the insurance companies have felt that the suits were not bona fida in the sense that the injured spouses would not have brought suit excepting for the purpose of procuring the proceeds of the policy which in fact had been written for the protection of the automobile owner rather than for the benefit of the person who might be injured.

Such cases are very difficult to defend for the reason that the natural interest of the assured is with the person suing and it has been

[2] 181 Wis. 591, 195 N.W. 855.
[3] 173 Wis. 184, 180 N.W. 834.
[4] 175 Wis. 456, 185 N.W. 525, 20 A.L.R. 1008.

felt that the insurance companies could not get the cooperation from the policy holders to which they are entitled. The limitation of liability as made in the *Cleary* case will be a considerable deterrent to hubands or wives suing the other under circumstances where no culpable negligence exists.

CHAS. B. QUARLES *

Homestead: Alienation; Abandonment; Estoppel.—Article I, Section 17 of the Wisconsin Constitution provides that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws exempting a reasonable amount of property from seizure or sale for the payment of any debt hereafter contracted."

In pursuance of this section the statutes state "A homestead shall be exempt from execution . . . . for the debts of such owner to the amount in value of $5000"[1] . . . ., and the section providing for methods of conveyancing says, "but no mortgage or other alienation by a married man of his homestead exempt from execution or any interest therein, legal or equitable, present or future, by deed or otherwise without his wife's consent, evidenced by her act of joining in the deed, mortgage or other conveyance shall be valid or of any effect whatever. . . ."[2] The plaintiff and defendants in *Krueger v. Groth et ux*[3] each owned a homestead consisting of farm lands and buildings. By an oral agreement between Krueger, the plaintiff, and Groth, who, with his wife, is a defendant, an exchange of the farms was decided upon and carried out as to the occupation of the respective premises.

After several months occupation of Krueger's former farm and homestead, the defendants, the Groths, refused to consumate the oral agreement by an exchange of deeds, contending that the oral agreement was void for lack of the wife's joining in the conveyance of the homestead.

In an action for specific performance the trial court sustained the defendants but on appeal the case went to the plaintiffs.

In this case the court bases its decision on the ground of abandonment and equitable estoppel. "The homstead exemption being a privilege and not a title to land, it had lost, by defendants voluntary acts, all existence or efficacy." "Manifestly the defendants cannot have the benefits of two homesteads at one and the same time."

Under a statute similar to our own it was said, "Where a husband and wife orally agree to sell their homestead and the vendee pays the purchase price, enters into possession and makes improvements with the knowledge and consent of the wife she cannot successfully defend in a suit for specific performance."[4] In applying the doctrine of estoppel the court does not confine itself to facts, representations, or concealments as of the time of the transaction but also to subsequent conduct relied upon by the opposite party to his damage.

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[1] Wis. Stat. 272.20.

[2] Wis. Stat. 235.01.

[3] 190 Wis.—,209 N.W. 773.

[4] 10 Idaho 459—109 Am. St. Rep. 214.